UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MICHAEL COURTNEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:04 CV 1177 ERW
	)	DDN
JO ANNE B. BARNHART, Commissioner of Social Security,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This action is before the court for judicial review of the final decision of the defendant Commissioner of Social Security denying the application of plaintiff Michael Courtney for disability benefits under Title II of the Social Security Act (the Act), 42 U.S.C. §§ 401, et seq. The action was referred to the undersigned United States Magistrate Judge for a recommended disposition under 28 U.S.C. § 636(b).

I. BACKGROUND

A. Plaintiff's Application and Medical Records

In a September 2001 application for disability benefits plaintiff, who was born in 1951, alleged disability beginning September 18, 2001, due to pain in his back and knees. Plaintiff reports he worked from 1984 to 2001 as a truck driver. (Tr. 44, 52-54, 58, 82-89, 91.)

In an undated claimant questionnaire, plaintiff reported back pain after sitting too long in one position, as well as pain and stiffness in both knees. Plaintiff has to get up and move around after extended periods of sitting. He reported that these symptoms are made worse by sitting and standing for long periods of time. Plaintiff experiences this pain 95 percent of the day, and he takes no medications nor undergoes any treatment to relieve the symptoms. (Tr. 58-59.)

Plaintiff lives alone and he reports no problems going to sleep, except for waking up in the middle of the night due to pain in his legs and back. Plaintiff reports no changes or impairments in his ability

to attend to personal hygiene, prepare meals, follow directions, or shop. Plaintiff states he prepares easy meals and mostly eats out. Plaintiff's housekeeper cleans his home and does the laundry. (Tr. 59-60.)

Plaintiff watches sports and the news on television and reads the newspaper. He has a valid driver's license and often drives to the store and to restaurants. Plaintiff leaves his home daily for meals and to see friends. He reports no difficulties driving, managing finances, getting along with others, or using a phone. Plaintiff's activities include volunteering at the Elks Lodge and the American Legion. (Tr. 60-61.)

Plaintiff's medical records begin with treatment records from Deaconess Hospital and St. Louis-Clayton Orthopaedic and Sports Medicine Group. These records related to plaintiff's left knee injury and subsequent surgery for a torn meniscus. All surgery records and follow-up records are dated from 1979-1980 and indicate plaintiff tolerated the surgery well and had no significant, post-operative impairments. (Tr. 100-134.)

On January 20, 1993, plaintiff was seen by Jerome F. Levy, M.D., for a worker's compensation evaluation. on February 12, 1992, plaintiff broke his right wrist after a fall at work. Dr. Levy noted plaintiff's wrist was "set," and that he complained of pain and stiffness. Dr. Levy noted that plaintiff's medical history included left knee surgery, a spinal fusion, and the insertion of a rod following an airplane crash in 1989. Dr. Levy reported that plaintiff appeared to be doing well after his back surgery. (Tr. 135-36.)

On examination, plaintiff exhibited normal gait and the ability to heel and toe walk. Plaintiff reported no discomfort upon back motion, and he had a 50 percent loss in extension, an 11 percent loss in flexion, and an abnormal lumbodorsal curvature. Plaintiff had a 37 percent loss in function of his right wrist; however, he denied any pain during motion. Examination of the lower extremities was essentially normal. Radiological examination revealed a healed fracture of the right wrist, moderate degenerative arthritis and irregularity of articular surface in the left knee, and moderate compression fracture,

moderate degenerative arthritis, healed fractures, and narrowing of the vertebra space in the lumbar spine. (Tr. 137-38.)

Dr. Levy diagnosed plaintiff as follows:

1. Healed right wrist fracture, with deformity, with stiffness and weakness.

2. Post fracture, dorsal spine, with internal fixation and chronic strain.

3. Post excision of meniscus, left knee, with chronic strain.

4. Probable early left knee chondromalacia.

5. 35 percent permanent partial disability in the right wrist.

6. 40 percent permanent partial disability due to back problems.

7. 25 percent permanent partial disability due to problems in his left knee.

(Tr. 138-39.)

On March 26, 2001, plaintiff saw David E. Chalk, M.D., for right knee pain and swelling. He was diagnosed with a torn medial meniscus. On May 10, 2001, plaintiff saw Dr. Chalk after knee arthroscopy. On June 12, 2001, Dr. Chalk noted plaintiff continued to have moderate swelling, but with full range of motion and improved pain. Plaintiff was prescribed Vioxx.[1] In a July 10, 2001, follow-up appointment, plaintiff continued to have moderate joint effusion,[2] but denied any pain. Dr. Chalk discontinued Vioxx after plaintiff said it "was of no help." (Tr. 141.)

Physical therapy notes from May 18, 2001, to June 5, 2001, indicate plaintiff continued improving after knee surgery. Plaintiff's reports of pain decreased to minimal pain or no pain at all. A June 4, 2001, therapy note indicates plaintiff stopped doing his home exercises;

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[1]Vioxx is used to relieve the symptoms of osteoarthritis and manage acute pain. Physician's Desk Reference, 2050 (55th ed. 2001).

[2]Effusion is defined as "[t]he escape of fluid from the blood vessels or lymphatics into the tissues or a cavity." Stedman's Medical Dictionary, 491 (25th ed. 1990).

however, the June 5, 2001, discharge record indicates plaintiff was compliant with the prescribed home exercise plan. (Tr. 143-47.)

On October 29, 2001, plaintiff saw Raymond Leung, M.D., for a consultative examination. Dr. Leung noted that plaintiff complained of back pain, which he rated as occasionally a ten on a one-to-ten pain scale, but does not limit his range of motion; intermittent stiffness and pain in both knees, but with normal range of motion; and a previous right arm fracture, with no pain or decrease in range of motion. Plaintiff further reported difficulty standing, sitting and walking for prolonged periods of time. He further reported no difficulty with grip strength, no difficulty dressing himself, and the ability to lift up to 100 pounds. (Tr. 155-56.)

Physical examination was essentially normal with respect to skin, nodes, eyes, ears, nose, mouth, neck, cardiology, pulmonary, abdomen, neurology, and extremities. Plaintiff was able to heel and toe walk and squat. Plaintiff had normal gait, good grip strength, fine finger movements, no muscle atrophy, and no tenderness in his back. Plaintiff had mild swelling of the right knee and crepitation [3] in the knees with range of motion. (Tr. 156-57.)

Dr. Leung diagnosed plaintiff as follows:

1. Back Pain: plaintiff exhibited full range of motion, negative straight leg raise, and no tenderness to palpation.

2. Knee pain: cartilage damage in both knees; moderate degenerative arthritis and irregularity of the articular surface of the left knee, per x-ray; full range of motion in both knees; slight swelling the right knee, crepitation in both knees with range of motion; and normal gait.

3. Right forearm fracture: non-tender; full range of motion; and intact fine finger movements.

(Tr. 158.)

On November 15, 2001, non-treating, non-examining provider Donald Proctor, M.D., completed a "Residual Physical Functional Capacity Assessment." Dr. Proctor found that plaintiff could occasionally lift

[3]Crepitation is the "[n]oise or vibration produced by rubbing bone or irregular cartilage surfaces together . . . ." Id. at 368.

20 pounds, could frequently lift ten pounds, could stand or walk about six hours in an eight-hour day, could sit about six hours in an eight-hour day, and was unlimited with respect to pushing and pulling. He further opined that plaintiff could occasionally climb ladders, ropes and scaffolds, stoop, kneel, and crawl, and could frequently climb stairs and ramps, balance and crouch. Dr. Proctor assessed plaintiff had no manipulative, visual, or communicative limitations. With respect to environmental limitations, plaintiff should avoid concentrated exposure to extreme cold and vibration, but was unlimited with respect to exposure to extreme heat, wetness, humidity, noise, fumes, odors, dusts, gases and poor ventilation, and hazards (such as machinery and heights). Narratively, Dr. Proctor noted that he found plaintiff's allegations were "largely credible." (Tr. 64-71.)

On February 18, 2002, plaintiff saw Boris Khariton, M.D., for evaluation, at SSA's request. Physical examination revealed plaintiff had no joint or extremity edema, had good range of motion in his lumbar spine, with only mild limitation in lumbar extension. Plaintiff had no tenderness in his back on palpation. Plaintiff's knees were free from edema and exhibited good range of motion. Plaintiff had good range of motion in his upper extremities including his right wrist. Plaintiff reported mild pain in his knees upon squatting. Motor examination revealed good motor strength in the upper and lower extremities. Dr. Khariton concluded plaintiff may be limited in work related to squatting, kneeling and lifting, as well as prolonged sitting requiring the need to change positions every two to three hours. (Tr. 161-63.)

Dr. Khariton also completed a "Medical Source Statement of Ability to do Work-Related Activities (Physical)." He noted plaintiff was limited to lifting 50 pounds occasionally and 20 pounds frequently. Plaintiff could stand and walk at least two hours in an eight-hour day, could sit less than about six hours in an eight-hour day, and was unlimited with respect to pushing and pulling. Dr. Khariton noted that these limitations were based on plaintiff's complaints of pain after prolonged sitting and squatting. Dr. Khariton determined plaintiff could never kneel, could occasionally climb, crouch, crawl and stoop, and could frequently balance. He further found plaintiff was unlimited

with respect to reaching, handling, fingering, feeling, seeing, hearing and speaking, and exposure to temperature extremes, noise, dust, vibration, humidity/wetness and fumes. Plaintiff was limited in his ability to be exposed to hazards, such as machinery and heights, but Dr. Khariton provided no narrative explanation for this limitation. (Tr. 165-68.)

A July 1, 2002, medical record shows plaintiff complained of left heel pain. There is no indication of this provider's identity.[4] On August 1, 2002, plaintiff saw Dr. Chalk "after a couple of years of absence" for intermittent left heel pain of six months and pain in the left hip when laying in bed with his legs crossed. Dr. Chalk diagnosed plaintiff with trochanteric bursitis[5] and Achilles tendinitis.[6] He prescribed physical therapy, Vioxx, and a one-month follow-up. On August 19, plaintiff reported improvement in hip pain, but continued pain in his heel. Plaintiff was prescribed Celebrex[7] and Vioxx was discontinued. Plaintiff returned for a follow-up appointment on November 5, 2002. At this visit, plaintiff reported continued heel pain. Dr. Chalk recommended surgical excision of the calcaneal tuberosity and re-attachment of the Achilles. (Tr. 171-72, 221.)

On December 10, 2002, plaintiff saw Dr. Chalk two weeks after heel surgery. Plaintiff was to progress to full weight bearing in two weeks, and Dr. Chalk noted the incision was clean and dry and the Achilles was attached well. On January 17, 2003, Dr. Chalk noted plaintiff's incision was "well healed," and that his range of motion was "excellent." Plaintiff's "boot" and activity modification were

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[4]An August 2002 record from Dr. Chalk notes that plaintiff was "injected by Dr. Mitchell," for this pain.

[5]Trochanteric Bursitis is characterized by pain and inflammation in the hip; commonly known as hip bursitis. About.com at http://orthopedics.about.com/cs/hipsurgery/a/hipbursitis.htm (last visited August 15, 2005).

[6]Tendinitis is the "inflammation of a tendon." Stedman's at 1560-61.

[7]Celebrex is prescribed for the signs and symptoms of arthritis. Physician's Desk Reference at 2483.

discontinued. On February 4, 2003, plaintiff complained of migratory heel pain that felt like a "burning sensation." Examination revealed "acceptable" range of motion, intact Achilles attachment, and a negative Thompson's test. Dr. Chalk diagnosed plaintiff with post-insertional bursitis and prescribed Bextra.[8] On March 4, 2003, plaintiff reported improved pain with stretching exercises and Bextra. Dr. Chalk noted pain with direct palpation and opined this was due to calcodynia.[9] (Tr. 223.)

On March 18, 2003, plaintiff saw Frederick J. Peet, Jr., D.P.M., P.C., for pain in his heel after foot surgery. Dr. Peet noted plaintiff took Bextra, reported pain on palpating the incision and scar, and stated he had never tried stretching exercises. Plaintiff was prescribed home cross-fiber massage and stretching exercises, and follow-up with Dr. Peet for ultrasound therapy. On April 2, 2003, plaintiff underwent ultrasound treatment. At this visit, plaintiff reported the stretching exercises made his heel feel better, but later it began hurting again. (Tr. 216.)

On June 24, 2003, plaintiff was seen by an unknown provider for pain after he reached over to pick up a board two days prior to the visit. Plaintiff denied pain at the time of the incident, but said he could hardly get out of bed the next morning. It appears as though plaintiff was taking Oxycodone[10] for the pain, and he may have been

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[8]"Bextra is used to reduce pain, inflammation, and stiffness caused by osteoarthritis and adult rheumatoid arthritis." Drugs.com at http://www.drugs.com/bextra.html (last visited August 15, 2005).

[9]Calcodynia is a "[p]ainful heel." Stedman's at 229.

[10]"Oxycodone is used to relieve moderate to moderate-to-severe pain." MedlinePlus at http://www.nlm.nih.gov/medlineplus/druginfo/medmaster /a682132.html (last visited August 15, 2005).

prescribed Percocet,[11] Soma,[12] and another, illegible medication. The medical record is difficult to interpret and the prescribed course of treatment is not entirely clear. (Tr. 225.)

B. Plaintiff's Hearing Testimony and the ALJ's Decisions

Administrative Law Judge (ALJ) James K. Steitz held a hearing on August 5, 2002, and then issued an October 16, 2002, decision denying benefits. On April 11, 2003, the Appeals Council vacated the ALJ's decision and remanded plaintiff's application. A second hearing was held on December 22, 2003, by ALJ Craig Ellis, and he issued a decision denying benefits after remand on March 18, 2004.

1. August 5, 2002, Hearing Testimony

The ALJ conducted a hearing at which plaintiff was represented by counsel. Plaintiff testified that he was unmarried, with no children, and living alone. Plaintiff graduated high school, with no formal training or education after that time. Plaintiff testified that he worked as a local and over-the-road truck driver for the past 15 or 16 years. This worked involved regularly loading and unloading objects from 20 to 75 pounds. Plaintiff testified that he stopped working due to pain in his knees and back after a plane crash a few years prior to the hearing. Plaintiff had difficulty getting in and out of the truck, as well as pain after sitting for extended periods. However, plaintiff testified that these problems never prevented him from attending to, or completing, his work. (Tr. 228-33.)

Plaintiff further testified that, in addition to his back and knee pain, he has pain in his feet and hips. Plaintiff testified that this pain is due to bursitis, and that he takes Vioxx for treatment. Plaintiff is able to drive, but if he drives long distances his knees

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[11]Percocet, is indicated for the relief of moderate to moderately severe pain." Physician's Desk Reference at 1211.

[12]Soma "is indicated as an adjunct to rest, physical therapy, and other measures for the relief of pain, muscle spasms, and limited mobility associated with acute, painful musculoskeletal conditions. Id. at 3252.

will ache and get stiff, and he needs to stand up every couple of hours. Plaintiff testified that his condition is unchanged since leaving work. (Tr. 233-35, 237.)

Regarding his activities, plaintiff testified he volunteers at the Elks Lodge and the American Legion. He does not participate in many recreational activities, because he is unable to walk more than a mile without pain in his back, hips, and knees. Plaintiff can bend, but he is unable to maintain a bended position for a length of time. Plaintiff testified that he can lift and carry items such as groceries into his house; however, he was unable to quantify a maximum lifting weight. Plaintiff testified that he generally sleeps well, with occasional stiffness and pain upon waking. Plaintiff cares for his personal hygiene, and he has a housekeeper for household chores and a family member cuts the grass. (Tr. 235-37.)

2. The ALJ's October 16, 2002, Decision

In a decision denying benefits, the ALJ determined that the medical evidence showed plaintiff had "a history of thoracic lumbar fusion in 1989, left knee surgery in 1980, right knee surgery in 2001, and a broken right arm in 1992 . . . ." However, none of these impairments, singly or in combination, met or equaled a Listing impairment. (Tr. 177-84.)

In reaching his decision, the ALJ noted that plaintiff complained of back pain due to an injury suffered after a 1989 plane crash and subsequent surgery. However, the ALJ determined the medical evidence showed his back was essentially normal, and that plaintiff did not take any pain medication. With regard to his knees, plaintiff had surgery on his left knee in 1980 and right knee in 2001. Despite alleging pain, the ALJ concluded medical records show plaintiff had normal range of motion and strength in both knees, normal gait, mild pain upon squatting, and occasional swelling.

Plaintiff broke his arm in February 1992, requiring sustained time off work. The ALJ noted there were no medical records showing on-going treatment for this injury, and examination revealed plaintiff had no pain and normal range of motion. Plaintiff also reported hip and heel

pain. The ALJ found that these allegations were new, not meeting the 12-month duration requirement, and that no provider placed any restrictions on plaintiff due to these pains. (Tr. 180-81.)

In reviewing plaintiff's allegations and medical evidence, the ALJ noted that many of plaintiff's conditions occurred well before his allegations of disability, and that plaintiff continued to work after experiencing these impairments. Moreover, the ALJ determined that medical records did not show any deterioration in plaintiff's condition that would take away his ability to work. The ALJ further discerned that the medical records were void of consistent, ongoing medical treatment, any provider recommendation that plaintiff could not work, and complaints of severe pain, as opposed general stiffness. The ALJ determined these findings lessened plaintiff's credibility with regard to his level of impairment and motivation for SSA benefits. Additionally, plaintiff did not provide any indication he was unable to afford treatment or had been turned down for treatment. (Tr. 181.)

The ALJ concluded plaintiff retained the RFC to work, except for lifting over 20 pounds occasionally, lifting over ten pounds frequently, climbing ladders and scaffolding, stooping, kneeling or crawling more than occasionally, and avoiding concentrated exposure to extreme cold and vibrations. The ALJ determined that plaintiff's RFC precluded his past, relevant work, ultimately concluding plaintiff could be employed in a full range of light work.

3. April 11, 2003, Appeal's Council Decision

Reviewing The ALJ's October 16, 2002, decision, the Appeals Council vacated the decision and remanded the case for the ALJ to:

1. Further consider the examining source opinion and explain the weight given to the opinion.

2. Consider additional evidence from David E. Chalk, M.D.

3. Further consider plaintiff's RFC and provide specific rationale and reference to his decision.

4. Obtain additional medical evidence as necessary.

5. Obtain testimony of a Vocational Expert as to the effect plaintiff's impairments have on the occupational base.

6. Provide plaintiff with the opportunity for a second hearing.

(Tr. 204-06.)

4. December 22, 2003, Hearing Testimony

A different ALJ conducted a hearing at which plaintiff was represented by counsel and Vocational Expert (VE) Gary Weimholt, M.S., CDMS,[13] was present. In addition to similar testimony as was presented at the last hearing, plaintiff testified that his income source is through savings and he has health insurance through his previous employer. Plaintiff testified that he cannot work as a truck driver because he cannot sit long enough to complete the required ten-hour-a-day driving time due to pain and stiffness in his back and knees. (Tr. 242-45.)

With respect to activities of daily living, plaintiff testified that he does his own laundry. When he stoops, kneels or squats, plaintiff "feels like when I raise up my bones are rubbing together in my knees." Plaintiff spends most of his day watching television and volunteering at the American Legion Post. (Tr. 247, 249.)

Plaintiff testified that he had surgery approximately one to two years prior to the hearing for a heel spur. Since the surgery, plaintiff testified that he continues to have pain in his foot if he stands on it longer than one and a half to two hours, but the pain is less sharp than before the surgery. Plaintiff also had a back "fusion" in 1989, surgery on his left knee in 1979, and surgery on his right knee in 2001 for a torn ligament. Plaintiff testified his pain is the worst

[13]Mr. Weimholt has an extensive educational and employment background in vocational rehabilitation. (Tr. 194-96.)

in his knees, the right knee in particular. His right knee is painful occasionally when sitting, but particularly when he walks after sitting for a prolonged period. Plaintiff testified he spends several hours a day sitting in a recliner with his legs straight out, as this is the most comfortable position. (Tr. 247-51.)

The VE testified that plaintiff's past, relevant work as a truck driver was at the medium exertional level, semiskilled, with some transferable skills to the light exertional level and none to the sedentary level. The ALJ posited the following hypothetical:

> I'd like you to assume we have a hypothetical individual with the age, education, and work experience of the claimant who can occasionally lift and carry up to 50 pounds, who can frequently lift and carry 20 pounds, who can stand and walk for at least two hours in an eight hour work day, who can sit for about six hours in an eight hour work day, who can never kneel, okay, let me go back, on the sitting I'm going to, the first one I'm going to do strictly based on the consultative exam there so I need to change that sitting. The sitting he's checked less than six hours in an eight hour work day. Can never kneel, occasionally engage in all other postural activities, including climbing, with the exception of balancing can be done frequently. And must avoid work at unprotected heights. Okay, would past work be precluded with this RFC?

(Tr. 251-52.)

In answer to this question, the VE testified that plaintiff would be precluded from past, relevant work. With the hypothetical RFC, plaintiff would be capable of performing cashiering jobs (approximately 1500 in the state economy and 500 in metropolitan St. Louis); bench assembly jobs (approximately 2500 in the state economy and 833 in metropolitan St. Louis); and hand packaging (approximately 1500 in the state economy and 500 in metropolitan St. Louis). (Tr. 252-53.)

The ALJ posited a second hypothetical:

> [The claimant] [c]an occasionally lift and carry 50 pounds, up to 50 pounds, frequently lift up to 25, I'm sorry, I'll say frequently up to 20. Who can stand and walk about two hours over the course of an eight hour work day. Who can sit for about six hours over the course of any eight hour work day. And who needs a sit stand option after 60 minutes of continuous sitting, would need to be able to stand and get up for at least 10 minutes or so before resuming sitting. Cannot kneel, and lifting from the floor level could only be done infrequently. And I'm defining infrequently as less

> than occasionally. I'm going to indicate climbing of rope and scaffolds cannot be done, of stairs and ramps less than occasionally. And I'm going to say crouching less than occasionally. All other postural activities can be done occasionally. And lastly, must avoid work at unprotected heights. Okay, would, would a hypothetical individual with the age, education, and work experience of Mr. Courtney be able to do the past work of an over-the-road truck driver?

(Tr. 253-54.)

The VE responded that plaintiff would not be able to work as a truck driver; however, the same three jobs he cited in response to the first hypothetical would still be available. Upon questioning by counsel, the VE testified that the cashiering jobs may require working less than eight hours a day and still equate to substantial, gainful employment, but that the production positions require work eight hours a day. The VE further testified that someone lying in a reclining position with legs straight would not be able to engage in substantial, gainful activity. (Tr. 254-56.)

5. The ALJ's March 18, 2004, Decision

In his decision denying benefits, the ALJ found plaintiff

> has moderate arthritis in the left knee, a remote history of a right radius fracture, a remote history of removal of tears of a medial meniscus on the left, a remote history of a vertebral fracture, a prior history of a right menisectomy, a history of trochanteric bursitis on the left, and a history of a posterior heel calcaneal tuberosity osteophyte in 2002 excised in November 2002.

However, the ALJ determined that these impairments do not meet, either solely or in combination, a Listing impairment. (Tr. 11.)

The ALJ reached this decision based on complete review of plaintiff's testimony and record medical evidence. In self-reports, plaintiff noted that he is disabled based on broken vertebrae, a broken right arm, and two knee operations. Plaintiff further reported that 95 percent of the time he experiences back pain after prolonged sitting, knee pain and stiffness, foot pain when standing more than one and a half hours, and back and leg pain after standing for a prolonged period. (Tr. 12.)

Reviewing the medical evidence, the ALJ noted that plaintiff had spinal surgery in 1989, but he was doing well after surgery and he returned to work with only occasional pain. Medical records further indicate resolution of plaintiff's broken arm and no ongoing follow-up treatment. Regarding plaintiff's knees, medical evidence reveals that he improved after surgery. Plaintiff's allegations of heel pain have been present for six months, and his allegations of hip pain were described "as intermittent in nature and to occur while lying in bed with legs crossed." Moreover, treatment records show plaintiff received treatment for these problems, that he was "well-healed," and that resolution would be expected to occur within 12 months of onset. The ALJ determined that, overall, plaintiff sought infrequent treatment for these alleged conditions, and he did not seek aggressive, continued treatment for chronic pain. Moreover, the ALJ determined that treatment records revealed plaintiff was non-compliant with prescribed exercise treatment for his knees and heel. (Tr. 12-15, 19.)

The ALJ found that medical records also evidenced inconsistencies in plaintiff's allegations. Plaintiff alleges severe pain; however, he further alleges no difficulties with range of motion, the ability to lift 100 pounds, and instances free of pain or tenderness. The ALJ found that medical evidence further established plaintiff was never restricted from work for an extended period of time by any medical provider, and that his treating provider cleared him to return to work as of June 25, 2001, after right knee surgery. The ALJ further determined that plaintiff was engaged in substantial gainful employment for many years after suffering some of his alleged disabling conditions. (Tr. 14-17, 19.)

The ALJ found that inconsistencies in plaintiff's allegations, coupled with his infrequent medical treatment and a lack of pain medication, detracted from plaintiff's credibility. Moreover, plaintiff does not allege, and the records do not reflect, an inability to pay for treatment or medications, any denial of access to treatment, or that plaintiff suffered significant medication side-effects that precluded drug treatment. Moreover, the ALJ noted that plaintiff's activities of daily living belied his allegations of severe pain in that he reported

reading, watching television, and driving daily to meet friends at a restaurant. (Tr. 18-20.)

The ALJ addressed the consultative examiner's opinion that plaintiff could stand and walk for only two hours in an eight-hour period, and sit for less than six hours. The ALJ determined that this opinion was inconsistent with plaintiff's lack of medical treatment, plaintiff's ability to engage in substantial, gainful activity after reporting impairments, plaintiff's self-reports, medical records, and the consultative examiner's own examination. Moreover, the ALJ noted that the consultative examiner's opinion appeared to be based on plaintiff's allegations, which the ALJ found were not fully credible, and not the totality of medical evidence or clinical findings. (Tr. 20-21.)

The ALJ ultimately concluded that plaintiff retained the RFC to sit six hours in an eight-hour day; stand or walk six hours in an eight-hour day; frequently lift or carry 20 pounds; and occasionally lift or carry 50 pounds. This assessment precludes plaintiff from returning to his past, relevant work as a truck driver. Turning to the VE's hearing testimony, the ALJ determined that there were a significant number of jobs plaintiff could perform. Moreover, the ALJ determined that plaintiff would be able to work in these positions even assuming a more restrictive RFC urged by plaintiff including no kneeling; working with an opportunity to sit/stand; ability to stand for ten minutes after sitting for 60 minutes; only infrequent lifting from the floor, climbing stairs and crouching, and no climbing of ropes or scaffolds. However, the ALJ found that this RFC was not supported by substantial evidence. (Tr. 22-24.)

The Appeals Council declined further review. Hence, the March 18, 2004, ALJ decision became the final decision of defendant Commissioner subject to judicial review. (Tr. 3-5.)

In this appeal, plaintiff argues that (1) the ALJ failed to correctly assess his subjective complaints; (2) the ALJ failed to properly assess his RFC in light of existing cases; and (3) he is disabled pursuant to the SSA Medical-Vocational Guidelines (the Grids). (Doc. 6.)

II. DISCUSSION

A. General legal framework

The court's role on review is to determine whether the Commissioner's findings are supported by substantial evidence in the record as a whole. See Krogmeier v. Barnhart, 294 F.3d 1019, 1022 (8th Cir. 2002). "Substantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." Id.; accord Jones v. Barnhart, 335 F.3d 697, 698 (8th Cir. 2003). In determining whether the evidence is substantial, the court must consider evidence that detracts from, as well as supports, the Commissioner's decision. See Brosnahan v. Barnhart, 336 F.3d 671, 675 (8th Cir. 2003). So long as substantial evidence supports the final decision, the court may not reverse merely because opposing substantial evidence exists in the record or because the court would have decided the case differently. See Krogmeier, 294 F.3d at 1022.

To be entitled to benefits on account of disability, plaintiff must prove that he is unable to perform any substantial gainful activity due to any medically determinable physical or mental impairment, which would either result in death or which has lasted or could be expected to last for at least 12 months. See 42 U.S.C. §§ 423(a)(1)(D), (d)(1)(A), 1382c(a)(3)(A) (2004). A five-step regulatory framework governs the evaluation of disability in general. See 20 C.F.R. §§ 404.1520, 416.920 (2003); see also Bowen v. Yuckert, 482 U.S. 137, 140-41 (1987) (describing the framework); Fastner v. Barnhart, 324 F.3d 981, 983-84 (8th Cir. 2003). If the Commissioner can find that a claimant is or is not disabled at any step, a determination or decision is made and the next step is not reached. 20 C.F.R. § 404.1520(a)(4).

B. The ALJ's Credibility Determination

Assessing a claimant's credibility is primarily the ALJ's function. See Anderson v. Barnhart, 344 F.3d 809, 815 (8th Cir. 2003); Holstrom v. Massanari, 270 F.3d 715, 721 (8th Cir. 2001). In Singh v. Apfel, the Eighth Circuit held that an ALJ who rejects subjective complaints (of pain) must make an express credibility determination explaining the

reasons for discrediting the complaints. Singh, 222 F.3d 448, 452 (8th Cir. 2000).

The Eighth Circuit held in Polaski v. Heckler that an ALJ cannot reject subjective complaints of pain based solely on the lack of medical support, but instead must consider various factors. 739 F.2d 1320, 1322 (8th Cir. 1984). The factors include, in part, observations by third parties and treating and examining physicians relating to such matters as (1) the claimant's daily activities; (2) the duration, frequency, and intensity of the pain; (3) precipitating and aggravating factors; (4) dosage, effectiveness, and side effects of medication; and (5) functional restrictions. Id.

The ALJ found plaintiff's allegations were not credible. He noted that plaintiff was able to engage in substantial, gainful employment for a number of years after his back surgery, left knee surgery, and broken wrist. A review of the record reveals plaintiff worked nine years after his right wrist injury, 12 years after his back surgery, and over 20 years after his left knee surgery. Moreover, the record does not evidence a deterioration in these conditions after plaintiff's alleged disability onset date. See Dixon v. Sullivan, 905 F.2d 237, 238 (8th Cir. 1990) ("[Plaintiff] worked with his impairments over a period of years without any worsening of his condition. Thus, he cannot claim them as disabling.").

The record contains multiple instances where providers found that plaintiff had full range of motion in his left knee, back, and wrist, as well as instances where plaintiff reported no, or mild, pain in these areas. Providers found no pain on palpation, and plaintiff reported the ability to lift up to 100 pounds despite his alleged disabling pain. Moreover, the record shows plaintiff was released back to work after his left knee and back surgery with no significant restrictions. See Curran-Kicksey v. Barnhart, 315 F.3d 964, 968 (8th Cir. 2003) (quoting Polaski, 739 F.2d at 1322 ("The lack of supporting objective medical evidence may be used as 'one factor to be considered in evaluating the credibility of the testimony and complaints.'")); Gwathney v. Chater, 104 F.3d 1043, 1045 (8th Cir. 1997) ("The ALJ may discount subjective

complaints of physical and mental health problems that are inconsistent with medical reports, daily activities, and other such evidence.").

Long-term improvement is further supported by plaintiff's lack of ongoing medical treatment. With the exception of short-term treatment for back pain he experienced after lifting a board, plaintiff does not appear to have received ongoing medical treatment for problems related to his back, left knee, or right wrist during the relevant period. See Kelley v. Barnhart, 372 F.3d 958, 961 (8th Cir. 2004) ("Infrequent treatment is also a basis for discounting a claimant's subjective complaints."); Holley v. Massanari, 253 F.3d 1088, 1092 (8th Cir. 2001); Benskin v. Bowen, 830 F.2d 878, 884 (8th Cir. 1987) ("The ALJ was certainly entitled to find [claimant's] failure to seek medical attention inconsistent with her complaints of pain.").

Medical records after 2001 reveal that plaintiff had complaints or treatment for impairment in his right knee, hip, and heel. After surgery on his right knee, plaintiff reported no constant pain, and he was released to return to work in June 2001. With respect to plaintiff's alleged hip pain, he complained of the pain mostly when he was lying down with his legs crossed. However, shortly after first complaining of hip pain, plaintiff reported improvement, and there is no evidence of further treatment or assessment.

In August 2002, plaintiff complained of heel pain. Shortly, after surgery, medical records show plaintiff was healing well, he had "excellent" range of motion, and he was instructed to resume normal activities. Plaintiff continued to complain of occasional heel pain, and was instructed to take medication and engage in stretching exercises. Despite a March 4, 2003, medical record which showed that stretching exercises improved his heel pain, on March 18, 2003, plaintiff reported to the podiatrist that he never tried stretching exercises. While not dispositive of his credibility, this inconsistency suggests plaintiff may not have been compliant with medical treatment. See Edwards v. Barnhart, 314 F.3d 964, 967 (8th Cir. 2003) (ALJ may discount claimant's subjective complaints of pain based on failure to pursue regular medical treatment); Brown v. Chater, 87 F.3d 963, 965 (8th Cir. 1996) (holding that a claimant's failure to comply with

prescribed medical treatment and a lack of significant medical restrictions is inconsistent with complaints of a disabling pain); Britton v. Sullivan, 908 F.2d 328, 331 (8th Cir. 1990) (a claimant's inconsistent statements is a factor to consider in making a credibility determination).

Further inconsistent with plaintiff's alleged disabling pain is his failure to take pain medication. With the exception of a few, short-term instances, plaintiff reports taking no pain medication or request for pain medication. See Depover v. Barnhart, 349 F.3d 563, 566 (8th Cir. 2003) ("The failure to request pain medication is an appropriate consideration when assessing the credibility of a claimant's complaints of pain."); Johnson v. Chater, 87 F.3d 1015, 1017 (8th Cir. 1996) (citing Haynes v. Shalala, 26 F.3d 812, 814 (8th Cir. 1994) ("[A] claimant's failure to take strong pain medication is "inconsistent with subjective complaints of disabling pain.")).

Moreover, there is no indication plaintiff cannot afford pain medication or treatment. Dover v. Bowen, 784 F.2d 335, 337 (8th Cir. 1986) ("[T]he ALJ must consider a claimant's allegation that he has not sought medical treatment or used medications because of a lack of finances."); see also Hutsell v. Sullivan, 892 F.2d 747, 751 n.2 (8th Cir. 1989) ("It is for the ALJ in the first instance to determine a claimant's real motivation for failing to follow prescribed treatment or seek medical attention."). Plaintiff has reported no financial difficulties, he has medical insurance, and he has not reported being turned away for treatment. See Osborne v. Barnhart, 316 F.3d 809, 812 (8th Cir. 2003) (recognizing that a lack of funds may justify a failure to receive medical care; however, a plaintiff's case is buttressed by evidence he related an inability to afford prescriptions to his provider and was denied the prescription).

The ALJ also referred to plaintiff's activities of daily living as being inconsistent with his allegations of disabling pain. The ALJ noted plaintiff reads, watches television, drives daily to visit friends and go to restaurants, and volunteers at the American Legion Hall. Additionally, plaintiff reported no difficulty or changes with his self-care, preparing meals, following directions, shopping, and completing

household chores. Plaintiff does not engage in household chores, however, because he has a cleaning person.

While none of these activities would, of themselves, amount to an inconsistency between plaintiff's alleged impairments and activities, taken together, and in light of the aforementioned, they do little to buttress plaintiff's allegations that he is disabled. See Pena v. Chater, 76 F.3d 906, 908 (8th Cir. 1996) (affirming ALJ's discount of claimant's subjective complaints of pain where claimant was able to care for one of his children on daily basis, drive car infrequently, and go grocery shopping occasionally); Woolf v. Shalala, 3 F.3d 1210, 1213 (8th Cir. 1993) (plaintiff lived alone, drove, shopped for groceries and did housework with some help from neighbor).

It is not within the undersigned's purview to redetermine plaintiff's credibility. As long as there is substantial evidence in the record, the ALJ's decision will be upheld even if substantial evidence exists adverse to the ALJ's findings. See Krogmeier, 294 F.3d at 1022; Dixon v. Sullivan, 905 F.2d 237, 238 (8th Cir. 1990).

Reviewing the record *in toto*, the undersigned finds the ALJ adequately considered the Polaski factors. See Lowe v. Apfel, 226 F.3d 969, 972 (8th Cir. 2000) ("The ALJ was not required to discuss methodically each Polaski consideration, so long as he acknowledged and examined those considerations before discounting Ms. Lowe's subjective complaints."); cf. McGinnis v. Chater, 74 F.3d 873, 875 (8th Cir. 1996) (asserted errors in opinion writing do not require a reversal if the error has no effect on the outcome). Ultimately, the ALJ did not err in concluding plaintiff's subjective complaints of pain were not fully credible or as limiting as he advances.

C. The ALJ's RFC Determination

The RFC is "the most [a claimant] can still do despite" his or her "physical or mental limitations." 20 C.F.R. § 404.1545(a); see also Depover, 349 F.3d at 565. In determining plaintiff's RFC, the ALJ must engage in "a function-by-function assessment based upon all of the relevant evidence of an individual's ability to do work-related activities." S.S.R. 96-8p, 1996 WL 374184, at *3 (Soc. Sec. Admin. July

2, 1996). An RFC determination is a medical issue, Singh, 222 F.3d at 451, which requires consideration of supporting evidence from a medical professional. Lauer v. Apfel, 245 F.3d 700, 704 (8th Cir. 2001). The ALJ is required to determine plaintiff's RFC based on all the relevant evidence. See Anderson v. Shalala, 51 F.3d 777, 779 (8th Cir. 1995); 20 C.F.R. §§ 404.1546, 416.946 (2001).

The ALJ found plaintiff's impairments limited his RFC to "sitting more than six hours in an eight hour work day; standing and/or walking more than six hours in an eight hour work day; frequently lifting and carrying more than twenty pounds; and occasionally lifting and carrying more than fifty pounds." (Tr. 22.) Plaintiff argues that the ALJ failed to give the proper weight to Dr. Khariton's opinion regarding his impairments, and the ALJ's RFC is not supported by medical evidence or substantial evidence of record. The undersigned disagrees.

"A treating physician's opinion should not ordinarily be disregarded and is entitled to substantial weight." Singh, 222 F.3d at 452. If a treating physician's opinion is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence in the record, the opinion should be given controlling weight. Id. A treating physician's opinions must be considered along with the evidence as a whole, and when a treating physician's opinions are inconsistent or contrary to the medical evidence as a whole, they are entitled to less weight. See id.; Sampson v. Apfel, 165 F.3d 616, 618 (8th Cir. 1999). An ALJ should "give good reasons" for discounting a treating physician's opinion. Dolph v. Barnhart, 308 F.3d 876, 878-79 (8th Cir. 2002).

SSA regulations provide that "[g]enerally, the longer a treating source has treated . . . , the more weight we will give to the source's medical opinion. When the treating source has seen you a number of times and long enough to have obtained a longitudinal picture of your impairment, we will give the source's opinion more weight than we would give it if it were from a nontreating source." 20 CFR § 416.927(d)(2)(I); see also Randolph v. Barnahrt, 386 F.3d 835, 839-40 (8th Cir. 2004) (finding the ALJ did not err in discrediting the opinion of a treating physician who only saw plaintiff three times prior to

evaluating her ability to engage in employment, where treatment notes did not indicate the treating provider discussed with plaintiff her prior work experiences or ability to be employed, and the treating physician never treated plaintiff during a time when she was employed).

In this case, Dr. Khariton conducted a one-time examination and evaluation at SSA's request. There is no indication from the record that Dr. Khariton was in any way a "treating" provider or that his opinion should be treated as such. The ALJ specifically declined to give controlling weight to Dr. Khariton's opinion finding it was based on plaintiff's subjective complaints, as opposed to objective medical evidence, and that it was not supported by his examination.

A review of Dr. Khariton's RFC assessment shows he found plaintiff was limited to lifting 50 pounds occasionally and 20 pounds frequently; could stand and walk at least two hours in an eight-hour day; could sit less than about six hours in an eight-hour day; was unlimited with respect to pushing and pulling; could never kneel; could occasionally climb, crouch, crawl, and stoop; could frequently balance; and was unlimited with respect to reaching, handling, fingering, feeling, seeing, hearing and speaking, and exposure to temperature extremes, noise, dust, vibration, humidity/wetness and fumes.

Even though Dr. Khariton examined plaintiff prior to making his assessment, he noted that the foregoing limitations were based on plaintiff's complaints of pain. Dr. Khariton failed to provide any medical basis for his proffered limitations, despite the fact that the "Medical Source Statement" clearly requests the provider report his medical/clinical basis for assessed limitations. See Craig v. Apfel, 212 F.3d 433, 436 (8th Cir. 2000); Gaddis v. Chater, 76 F.3d 893, 895 (8th Cir. 1996) (an ALJ may discount physician's opinion that is based on discredited subjective complaints).

On examination, Dr. Khariton found plaintiff had full to mild limitation in back range of motion; normal range of motion in the knees; good range of motion in his wrists; and no pain on palpation. Dr. Khariton concluded that plaintiff *may* be limited in squatting, kneeling, and lifting very heavy objects from the ground, and in jobs requiring

prolonged sitting. However, Dr. Khariton made no diagnosis and provided no definitive limitations in any areas.

Given the fact that Dr. Khariton was a one-time examining consultant, coupled with the fact that he found no significant limitations on examination and based his RFC solely on plaintiff's subjective complaints, which the ALJ found were not fully credible, the undersigned concludes it was not error for the ALJ to not adopt Dr. Khariton's RFC evaluation *in toto* affording him controlling weight.

The record contains an additional consulting, non-examining RFC evaluation from Dr. Proctor. After reviewing the medical evidence, Dr. Proctor found plaintiff could occasionally lift 20 pounds; could frequently lift ten pounds; could stand or walk about six hours in an eight-hour day; could sit about six hours in an eight-hour day; was unlimited with respect to pushing and pulling; could occasionally climb ladders, ropes and scaffolds, stoop, kneel, and crawl; and could frequently climb stairs and ramps, balance and crouch. In contrast to Dr. Khariton, Dr. Proctor supported his assessment by referring to plaintiff's relevant diagnoses, objective symptoms, and medical and social history, as well as plaintiff's allegations of pain.

Generally, the ALJ will give more weight to an examining provider than that of a non-examining provider, see 20 CFR § 416.927(d)(1) ("[W]e give more weight to the opinion of a source who has examined you than to the opinion of a source who has not examined you."), and the assessment of a one-time consulting provider by itself is not entitled to substantial weight. However, "the ALJ need not give controlling weight to a physician's RFC assessment that is inconsistent with other substantial evidence in the record," Strongson v. Barnhart, 361 F.3d 1066, 1070 (8th Cir. 2004), and the ALJ must assess a claimant's RFC based on all relevant, credible evidence in the record . . . ." See Tucker v. Barnhart, 363 F.3d 781, 783 (8th Cir. 2004); Hilkemeyer v. Barnhart, 380 F.3d 441, 446 (8th Cir. 2004).

The ALJ was not required to give controlling deference to either the opinion of Dr. Khariton, who, while having the benefit of examining plaintiff before his assessment, based his findings on plaintiff's subjective complaints later found not to be fully credible, or Dr.

Proctor, who based his findings on a review of medical/clinical findings, but did not examine plaintiff. In accordance with SSA rules and his duty in this regard, the ALJ's RFC determination reflects a combination of each provider's RFC assessment and plaintiff's credible complaints, and is further supported by the totality of additional medical evidence.

As previously detailed, the record reveals no long-term, provider-imposed restrictions, no deterioration since plaintiff's alleged disability onset date, a lack of pain on examination, normal range of motion, a lack of pain medication, infrequent treatment, and plaintiff's failure to routinely report his alleged pain and limitations to providers during the relevant time period. All these findings support the ALJ's RFC determination, and it is plaintiff's burden to provide contrary evidence. See 20 C.F.R. § 404.1512(c) ("Your responsibility. . . . You must provide evidence showing how your impairment(s) affects your functioning during the time you say that you are disabled, and any other information that we need to decide your case."); Eichelberger v. Barnhart, 390 F.3d 584, 591 (8th Cir. 2004) ("A disability claimant has the burden to establish [his] RFC.").

Based on the totality of all evidence and circumstances, the undersigned finds the ALJ's RFC was supported by substantial evidence of record and was based, in part, on medical evidence. Cf. Kelley v. Barnhart, 372 F.3d 958, 962 (8th Cir. 2004) ("[T]he presence of evidence that might support a conclusion opposite to that reached by the Commissioner does not permit reversal if the balance of the record lends substantial support to the Commissioner's decision.").

D. Medical-Vocational Guidelines (Grids) [14]

Generally, when a decision cannot be made on the medical considerations alone, a disability claimant can properly be evaluated under the Grids, which take administrative notice of whether a significant number of jobs exist in the national economy for a person with a certain RFC, age, education, and work experience. Heckler v.

[14] See 20 C.F.R. Part 404, Subpart P, Appendix 2.

Campbell, 461 U.S. 458 (1983). Proper reliance on the Grids eliminates the need for the Commissioner to consider and rely upon the testimony of a vocational expert. McCoy v. Schweiker, 683 F.2d 1138, 1148 (8th Cir. 1982) (en banc).

Having found the ALJ adequately assessed plaintiff's credibility and RFC, the undersigned finds it is not necessary to determine whether plaintiff is disabled, per the Grids, for not being able to engage in employment for 40 hours per week. The ALJ determined that plaintiff was able to stand or walk six hours in an eight-hour day and sit six hours in an eight-hour day, evidencing the ability to work 40 hours per week.

Similarly, the hypothetical to the VE was proper. A hypothetical question to a VE must precisely describe a claimant's impairments so that the VE may accurately assess whether jobs exist for the claimant. Newton v. Chater, 92 F.3d 688, 694-95 (8th Cir. 1996); see Pierce v. Apfel, 173 F.3d 704, 707 (8th Cir. 1999) (a proper hypothetical presents to the VE a set of limitations that mirror those of the claimant); Totz v. Sullivan, 961 F.2d 727, 730 (8th Cir. 1992). It "must capture the concrete consequences of claimant's deficiencies." Pickney v. Chater, 96 F.3d 294, 297 (8th Cir. 1996).

The ALJ asked the VE to determine what jobs exist if plaintiff can lift up to 50 pounds occasionally; lift up to 20 pounds frequently; stand and walk two hours in an eight-hour day; sit six hours in an eight-hour day; cannot kneel, climb rope or scaffolding; can lift from the floor only infrequently; crouch, climb stairs and ramps less than occasionally; and must have a sit/stand option every 60 minutes. This hypothetical was even more restrictive than the RFC the ALJ ultimately assessed; that plaintiff could stand or walk for six hours in an eight-hour day; sit for six hours in an eight-hour day; could lift 50 pounds occasionally; and could lift 20 pounds frequently.

Accordingly, it is reasonable to conclude that, if a more limiting RFC yielded a substantial number of jobs in the economy, then a less restrictive RFC should produce a similar if not greater number of positions. The ALJ's hypothetical to the VE captured, at a minimum, "the concrete consequences of claimant's deficiencies," Pickney, 96 F.3d at 297, and therefore, was not in error.

RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned that the decision of the Commissioner of Social Security be affirmed under sentence 4 of 42 U.S.C. § 405(g).

The parties are advised that they have ten (10) days in which to file written objections to this Report and Recommendation. The failure to file timely written objections may waive the right to appeal issues of fact.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed on September 6, 2005.